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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Applications of

GAF BROADCASTING COMPANY, INC.

For Renewal of the License
of FM Broadcasting Station WNCN
New York, New YorkCLASS ENTERTAINMENT
AND COMMUNICATIONS, L.P.

THE FIDELIO GROUP, INC.

For a Construction Permit
for a New FM Station on
104.3 MHz at New York, New YorkMM Docket No. 93-54

File No. BRH-910201WL

File No. BPH-910430ME

File No. BPH-910502MQ

To: Administrative Law Judge Joseph Chachkin

MOTION TO DISMISS

GAF Broadcasting Company, Inc. ("GAF"), the licensee of WNCN(FM), New York, New York, by its attorneys, respectfully requests that the Presiding Judge dismiss the application of The Fidelio Group, Inc. ("Fidelio") for failure to respond to two express directives from the Commission. In support of this request, the following is shown.

Fidelio's competing application for WNCN's frequency contained serious technical defects and omissions. As GAF explained in its November 19, 1991 Petition To Deny, Fidelio failed to demonstrate that its highly unusual antenna

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arrangement, to be located on the Chrysler Building, would provide adequate city grade coverage of New York City. The Hearing Designation Order¹ ("HDO") in this proceeding concluded that GAF's arguments were meritorious. Rather than dismissing Fidelio's application outright, however, the Commission directed Fidelio to file an amendment containing a statement from any antenna manufacturer, certifying that it would be able to construct an antenna that would be able to provide omnidirectional service in the "relatively unusual" arrangement proposed. The Commission ordered Fidelio to file this amendment within 30 calendar days after release of the HDO, i.e., not later than April 14, 1993. DA 93-226 at ¶¶ 17, 48. GAF has not yet received this amendment, and checks with FCC sources also indicate that Fidelio has failed to file this mandatory amendment.

GAF's Petition To Deny also demonstrated that Fidelio erroneously represented its application was not subject to environmental processing. On the contrary, as the HDO properly concluded, environmental processing is necessary for not one but two independent reasons. First, Fidelio proposed to sidemount a broadcast antenna on a building which has been designated an historic landmark. Second, Fidelio's proposal would expose members of the public to excessive RF radiation unless corrective measures are taken. Thus, the Commission ordered Fidelio to

¹DA 93-226, Chief, Audio Services Division, released March 15, 1993.

prepare and submit to the Presiding Judge and the Chief, Audio Services Division, an environmental assessment within 30 days after the HDO's release, i.e., not later than April 14, 1993. DA 93-226 at ¶¶ 23, 47. Again, GAF has not yet received the requisite filing, and checks with FCC sources indicate that Fidelio has failed to file its environmental assessment.

GAF respectfully requests that the Presiding Judge now issue an order dismissing the Fidelio application for failure to comply with the Commission's directives. The filings Fidelio should have made are not trivial matters, but concern its basic qualifications: compliance with the FCC's minimum coverage, environmental processing, and RF radiation requirements. In light of the gravity of these matters, and Fidelio's failure to even address its noncompliance with the HDO, dismissal would clearly be warranted.

The Commission has declared that prosecution of an application means timely compliance with procedural as well as substantive rulings. It is well within an ALJ's broad discretion

In CSJ Investments, Inc., 5 FCC Rcd 3741, 67 RR 2d 1648 (Rev. Bd 1990), rev. denied, FCC 90-406, released December 7, 1990, the Review Board affirmed the Presiding Judge's dismissal of an applicant that failed to timely comply with an HDO's directive concerning its technical proposal, as well as other requirements. The HDO ordered that applicant to file a corrective amendment concerning its proposed tower height with the ALJ not later than 30 days after the HDO's release. Although the Presiding Judge granted the applicant a two-week extension of that time, it sought an additional month to specify a new transmitter site, which request the Judge denied. The applicant filed an untimely and unjustified amendment nearly two months later. See also Vela Broadcasting Inc., 102 FCC 2d 997, 59 RR 2d 307 (Rev. Bd 1985) (affirming applicant's dismissal for failure to comply with HDO's directive that it supplement application in order to cure defects relating to its basic qualifications, and other procedural failures).

In this case, Fidelio has similarly failed to respond to an express directive in the HDO concerning its technical proposal. Moreover, Fidelio has failed to even request an extension of time or proffer any explanation. Like the applicant in CSJ Investments, Fidelio's nonresponsiveness is compounded by an additional omission, its failure to submit the requisite environmental assessment, again without explanation.²

²On April 12, 1993, Fidelio requested that the Commission defer the procedural dates in this proceeding. Fidelio has never

In Comuni-Centre Broadcasting, Inc. v. FCC, 856 F.2d 1551, 1554 (D.C. Cir. 1988), cert. denied, 489 U.S. 1083 (1989), the U.S. Court of Appeals listed some of the factors which were appropriate for consideration in dismissing an applicant for failure to meet procedural deadlines. They are (1) the applicant's claimed justification; (2) the prejudice suffered by other parties; (3) the burden placed on the administrative system; and (4) the need to punish abuse of the system and deter future misconduct.

In the present case, Fidelio has submitted no justification which may be considered, but simply ignored the Commission's orders. The other parties have been prejudiced by their inability to assess Fidelio's case, or even to determine whether it is qualified to remain as a party in this proceeding. The burden on other parties is especially significant now, given the imminent deadline for conferring on initial discovery requests. Fidelio has burdened the FCC processes not only by failing to respond to clear Commission directives, but by delaying environmental processing of its application. Under the FCC rules, the Commission must solicit and consider comments on Fidelio's environmental assessment from the Department of the Interior, State Historic Preservation Officer and the Advisory

Fidelio's request automatically stayed the procedural dates in this proceeding. Section 1.102(b)(3) of the FCC rules provides that if an application for review of an interlocutory action is filed, the Commission has discretion to stay the effect of that action. Thus, each of the applicants has subsequently filed its integration statement.

Council on Historic Preservation. 47 C.F.R. Sec. 1.1308(b)
(Note). This time consuming process cannot begin until Fidelio
files its environmental assessment. Finally, dismissal is
justified in order to deter future parties from ignoring the
clear directives of an HDO.

WHEREFORE, in light of the foregoing, it is respectfully
requested that the Presiding Judge issue an order dismissing the
Fidelio application for failure to prosecute.

Respectfully submitted,

GAF BROADCASTING COMPANY, INC.

CERTIFICATE OF SERVICE

I, Eve J. Lehman, a secretary at the law firm Fleischman and Walsh, hereby certify that I have this 26th day of April, 1993 placed a copy of the foregoing "Motion To Dismiss" in U.S. First Class Mail, addressed to the following:

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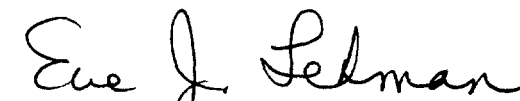
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